

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1946

528

*United States Court of Appeals
for the District of Columbia*

No. 9402

FILED NOV 26 1946

PAUL COOKE, *Appellant*

Joseph W. Thomas
CLERK

VS.

BOARD OF EDUCATION, *et al.*, *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

LEONARD S. HAYES,
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2002 Eleventh Street, N. W.
Washington, D. C.
Attorneys for Appellant

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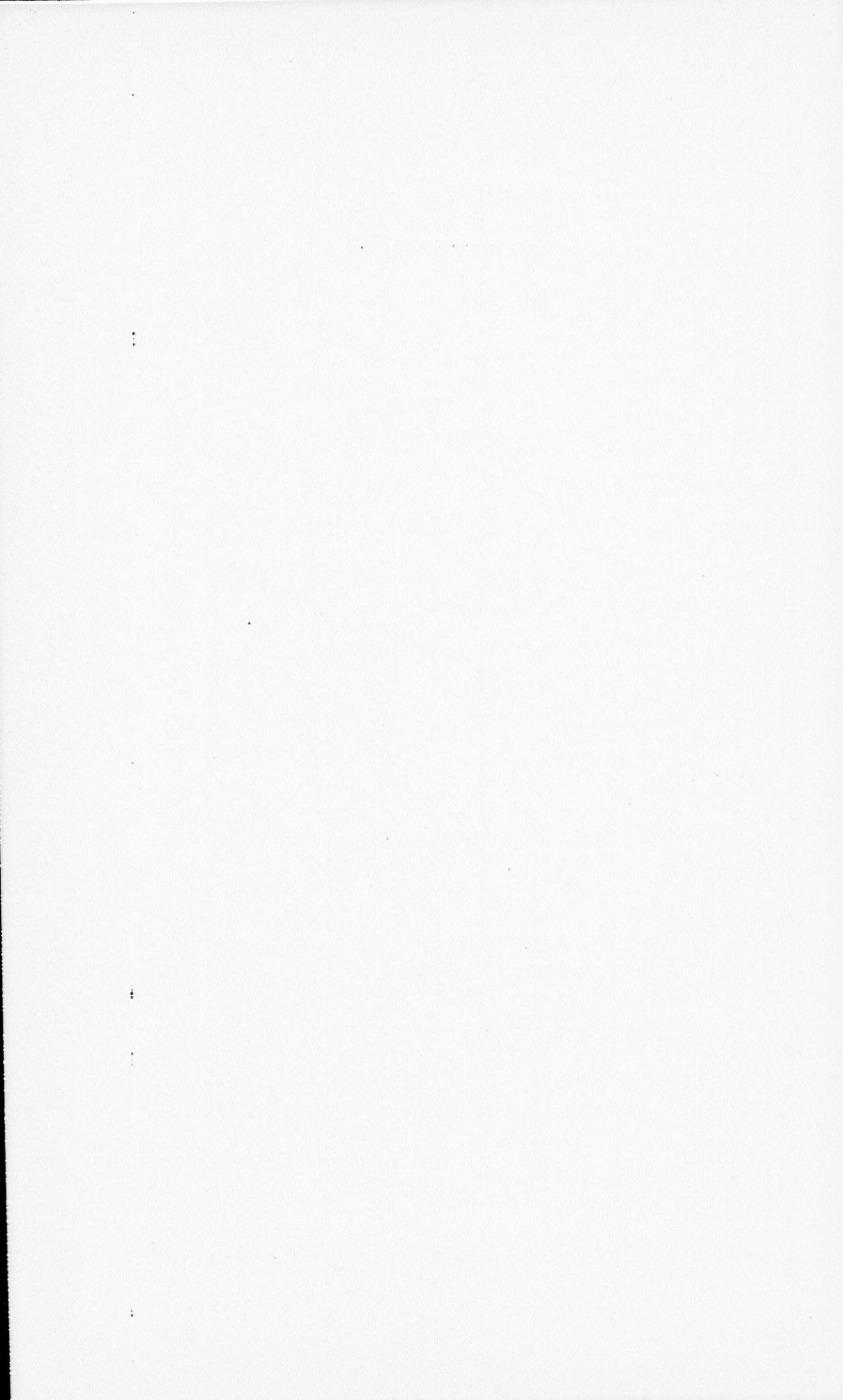
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

October Term, 1946

No. 9402

PAUL COOKE, *Appellant*

vs.

BOARD OF EDUCATION, *et al.*, *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment for the Defendants as a matter of Law in the District Court of the United States for the District of Columbia upon motions for summary judgment filed by both parties.

Jurisdiction of the District Court over all cases in law and equity between parties, both or either of which shall be a resident or be found within said District. This Court acquires jurisdiction to review the present cause by virtue

of the Code of the District of Columbia (1940) Title 17—Sec. 101, which provides for appeals from final judgments of the District Court.

Statement of Case

The appellant is a permanent teacher in the public school system of the District of Columbia (Appellant's App. 2). The appellant requested leave of absence in order to teach illiterate soldiers, (a work vital to National Defense and the war effort) on May 29, 1944 (Appellant's App. 6). The said leave of absence was granted June 4, 1944 (Appellant's App. 7), the said leave was extended until June 30, 1945 (Appellant's App. 3). The appellant returned to his position in the school system November 2, 1944 (Appellant's App. 3). Said appellant was denied the annual increment of One Hundred (\$100.00) Dollars as of July 1, 1944, (Appellant's App. 2) Sec. 626 of Title 31 of the Code of the District of Columbia sets forth the basis upon which the annual increment as of July 1, 1944 is to be given, and the appellant contends that he has met the requirements of such a basis and that as a matter of law he is entitled to the said increment.

Statutes

Sec. 626—Title 31—Code of the District of Columbia

“On the first day of each fiscal year, if his work is satisfactory, every permanent teacher, school officer, or other employee shall receive an annual increase in salary within his salary class or position as provided in Section 31—621 without action of the Board of Education.”

Statement of Points

1. That the Court erred in its interpretation of Section 626, Title 31 of the Code of the District of Columbia.

2. That the refusal of the Court to award judgment on the Plaintiff's Motion for Summary Judgment constituted reversible error.

Summary of Argument

1. The fact that the appellant had received a permanent status and that the leave of absence granted him specifically give him the right to return to his original position refutes any argument that he was not a permanent teacher as of July 1, 1944.

2. The Board of Education actually rated the appellant's work as satisfactory for the school year 1943-44.

3. The fact that the Board of Education gave the appellant credit for teaching experience as a result of his activities while on leave of absence.

4. The control exercised by the Board of Education over the appellant while he was on leave of absence would preclude the requirement that the appellant had to teach the entire school year within the school system of the District of Columbia in order to be eligible for the annual increment.

5. The material loss suffered by appellant and the prospects of greater losses.

ARGUMENT

1. That the Court erred in the interpretation of Section 626, Title 31 of the Code of the District of Columbia.

It is uncontroverted that the appellant became a permanent teacher on March 26, 1942, (Appellant's App. 2). The fact that appellant was granted a leave of absence not to extend beyond June 30, 1944, such leave to carry with it

the preferred right to return to his original position by the Board of Education through the Superintendent of Schools (Appellant's App. 7), would be conclusive proof that the Board of Education still considered the appellant as one of its permanent teachers.

The Counsel for the appellees, at the time of the argument of the motions for summary judgment, stressed the point that appellant was not a permanent employee at the beginning of the fiscal year because the appellant was not teaching in the District of Columbia, but instead was working for an entirely different employer in Maryland (Appellant's App. 11-12), and therefore the appellant did not occupy the position of a permanent employee on July 1, 1944 and his work was not satisfactory in that it was not performed in the public school system (Appellant's App. 14).

Accordingly, it would appear that the Trial Court has adopted the opposing counsel's interpretation of Section 626 of Title 31 of the Code and has found that the appellant was not a permanent teacher because he had been granted a leave of absence. This interpretation is clearly erroneous when it is seen that the Board of Education has the authority to grant leaves of absence to its regularly employed teachers (Code of the District of Columbia (1940)—Title 31—Sections 607 and 632).

Further, the Board of Education rated the appellant for his work in the public school system of the District of Columbia during the school year 1943-44 (Appellant's App. 18), and found it satisfactory. It is true that the appellant did not teach in the public school system the entire school year of 1943-44, but nowhere in Section 626 of Title 31, is the prerequisite of full attendance attached to the granting of longevity increase.

If Congress had intended that the attendance of the teacher was to be a factor beyond the "satisfactory" require-

ment, certainly the statute would not have been worded so that at the beginning of the fiscal year the longevity increase would be given, rather there would be a requirement that at the end of the fiscal year the attendance and other factors be computed and the teacher awarded his longevity increase.

In actuality the longevity increase is an increment for the experience a teacher compiles through the years of following his profession and an absence of 26 days with the approval of the Board of Education is not a proper basis for denying this increase which the Congress has legislated after due deliberation.

Therefore, it would appear that the appellant was a permanent teacher in the public school system of the District of Columbia during the school year 1943-44, and that the Board of Education found his work to be satisfactory. Having met these requirements, as a matter of law, the appellant is entitled to his annual increase in salary for the fiscal year of 1944.

2. That the refusal of the Court to award judgment on the Appellant's (plaintiff below) Motion for a Summary Judgment constituted reversible error.

There appears a dearth of opinions pro or con on this issue, however, a decision of the Comptroller General (B-41728), reported at Volume 23 Decisions of the Comptroller General of the United States 877, has been quoted by opposing counsel as being a proper basis for the Trial Court's refusing to grant judgment to the plaintiff below.

It is admitted that the statute involved, United States Code, Sec. 22, Title 39, is somewhat similar in its purpose to Sec. 626 of Title 31 of the Code of the District of Columbia. However, it seems hardly necessary to call to the

Court's attention the fact that the said decision amounts to nothing more than a lawyer's opinion as to a legal proposition and does not constitute a judicial precedent binding upon this Court within the doctrine of *Stare Decisis*.

The Comptroller General has said that:

"The 'one year's satisfactory service' mentioned in the statute to entitle a postal employee to an automatic promotion *manifestly* means service in the Postal Service. There is no law or regulation having the force and effect of law, which specifically authorizes the counting of service in private industry to which employees are assigned pursuant to War Manpower Directors and War Service Regulations of the Civil Service Commission issued thereunder for the purpose of increasing the compensation or the amount of leave to the credit of Federal employees upon restoration of their Federal positions."

However, the Comptroller did not have before him the facts which are present in the instant case, namely, that the Board of Education was in a position to determine and did so determine first as to whether or not the appellant should take the teaching position at Camp Holabird; secondly, as to how long the appellant would remain at the position and still be a permanent teacher in the District of Columbia, and; thirdly, that the Board, when the appellant returned to his permanent teaching position, gave him credit for teaching experience on an examination because of his tenure as a teacher of illiterate soldiers at Camp Holabird, (Appellant's App. 19-20).

The statute does not explicitly set forth that the permanent teacher has to complete a full year in order to receive his annual increment and where, as in this case, the Board has allowed the permanent teacher to carry on the same teaching function in furtherance of the War Effort and has given the teacher credit for the teaching experience so gained, it would appear that it was the intention of the Board that the teacher be entitled to his usual benefits, the

lending of the teacher for the period involved being the Board's effort to meet the National Emergency. Certainly under such circumstances, it would not be justice to penalize the teacher who took steps of great personal inconvenience in order to further the war efforts of the country (Appellant's App. 7).

The appellant contends that there is no requirement or necessity that a permanent teacher has to be actually teaching in the public school system of the District of Columbia, specifically on the first day of each fiscal year in order to receive the annual increment under the statute. The fact that the Board of Education has the right to grant or refuse leaves of absence would preclude such a narrow interpretation of the statute. Then too, such interpretation defeats the purpose of the statute in that in addition to meeting the "satisfactory" requirement of the statute, a permanent teacher could not be granted a leave of absence that included the first day of the fiscal year without losing his longevity increase, such a situation seems preposterous.

The appellant would like to call the Court's attention to the inequitable interpretation of the statute under the present facts. The appellant was away from the school system during the school year 1943-44 Twenty-six (26) days, namely, from June 4, 1944 to June 30, 1944. In the school year 1944-45, he was away from the school system One hundred and Twenty-seven (127) days, namely, from July 1, 1944 to November 5, 1944 (Appellant's App. 8). The appellant was denied his increase for the year 1943-44, when he was absent Twenty-six (26) days and he was given his increase for the year 1944-45, when he was absent One hundred and Twenty-seven (127) days. The said absence for both years being for the same purpose, namely, to teach illiterate soldiers at Camp Holabird, Maryland, the said leave of absence specifically having been granted by the Board of Education.

Further, the appellant wishes to point out the material loss he is forced to suffer because of the ruling of the lower court. The appellant's salary for the year 1943-44 was \$2000.00; for the year 1944-45 his salary remained \$2000.00 but with the increment would have been \$2100.00; for the year 1945-46, his salary was \$2500.00 (including salary raise of \$400.00, Act of Congress, July, 1945 and regular increment of \$100.00 July 1, 1945), with the increment of 1944, it would have been \$2600.00; for the year 1946-47 his salary was \$3050.00 (including salary raise of \$450.00, Act of Congress, July, 1946 and increment of \$100.00 July 1, 1946), with the increment of 1944, his salary would have been \$3150.00. Thus it is apparent that at the time of the filing of this brief the appellant has suffered a loss of \$300.00.

However, the appellant stands to suffer even greater loss in that he will continue to lose \$100.00 each year until he reaches the maximum of his present salary class, *i. e.* \$3750.00, seven years hence. Further, the appellant is also delayed a year from taking an examination for a higher salary class inasmuch as the Board of Education's rules require that a teacher reach the maximum of his salary class in order to qualify for a higher salary examination.

In review, it would appear from the facts and the statute involved that the lower court erred in finding that the defendants were entitled to judgment as a matter of law.

Respectfully submitted,

LEONARD S. HAYES,
FRANK D. REEVES,
Attorneys for Appellant.

APPENDIX
Case No. 9402

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APPENDIX

Case No. 9402

1

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

PVT. PAUL COOKE, 33992349
A.A.F.E.A.U.T.C.
316 A.A.F.B.U.
MacDill Field, Florida,

Plaintiff,

vs.

BOARD OF EDUCATION
of the District of Columbia,
the members of said Board being:

MARION WADE DOYLE

5500 33rd Street, NW

ROBERT A. MAURER

2029 Park Road, NW

LENORE W. SMITH

3249 Neward Street, NW

JOHN H. WILSON

512 Fifth Street, NW

C. MELVIN SHARPE

929 E Street, NW

VELMA G. WILLIAMS

1502 Park Road, NW

JAMES A. GANNON

1915 Biltmore Street, NW

ADELBERT W. LEE

311 Penn Ave., SE

GEORGE E. C. HAYES

613 F Street, NW

Washington, D. C.

and

ARTHUR R. PILKERTON

Auditor, District of Columbia

District Building

Washington, D. C.

and

DISTRICT OF COLUMBIA

Municipal Corporation

District Building

Washington, D. C.

Defendants.

Civil Action
No. 30123

**Amended Complaint to Require the District of Columbia
to Increase Salary of Complainant as Set
Forth by Statute**

1. The action arises under the District of Columbia Code of Laws, Title 11, Sec. 306.

2. Complainant sets forth that he was appointed a teacher in the public schools of the District of Columbia on March 26, 1941, in a probationary status, being assigned to salary class 2A at \$1600.00 per annum.

2 3. On March 26, 1942 his appointment was made permanent and he received his first longevity increase in salary in the amount of \$100.00 in accordance with Sec. 31-618 of the District of Columbia Code, (1940).

4. On July 1, 1942, complainant received further increase in salary of \$100.00, in accordance with said Section 31-626.

5. On September 1, 1942, complainant was promoted to salary class 2 C, at a salary of \$1900.00.

6. On July 1, 1943 complainant received a further increase in salary of \$100.00 in accordance with Section 31-826.

7. On September 1, 1943 complainant's promotion to salary class 2 C was made permanent.

8. By letter dated May 29, 1944 complainant requested leave of absence from the public schools of the District of Columbia after June 4, 1944, to accept appointment as an instructor of illiterate soldiers at Camp Holabird, Maryland, a position of civilian work urgently required in the war effort.

9. Complainant's request was duly approved and he was granted leave of absence from and after June 4, 1944,

such leave not to extend beyond June 30, 1944 and to carry with it the preferred right to return to his original position. Complainant's leave of absence under said order was extended by the Board of Education until June 30, 1945.

10. Effective October 19, 1944, complainant resigned from his position as instructor of illiterate adults at Holabird Signal Depot, Baltimore, Maryland and by letter dated October 20, 1944 applied for reinstatement as a teacher in the public schools of the District of Columbia.

11. Complainant was duly reinstated to his original position on November 2, 1944, at a salary of \$2000.00 per annum.

12. Complainant has been denied an increase of \$100.00 as of July 1, 1944, by virtue of a ruling of the Auditor of the District of Columbia.

WHEREFORE, the premises considered, the complainant prays:

3 1. That this Court require the District of Columbia Municipal Government to pay the complainant an increase in salary of \$100.00 as set forth by Section 31-626 of the District of Columbia Code; said increase having been denied by virtue of a ruling of the Auditor of the District of Columbia.

2. That this Court grant to the complainant whatever other relief as to the Court seems just and proper.

LEONARD S. HAYES,
Attorney for Complainant.

LEONARD S. HAYES, ESQUIRE
613—F—Street, N. W.
Washington, D. C.

4 **Answer of Defendants to Amended Complaint**

Come now the defendants in the above-entitled cause, by their attorneys, and for answer to the Amended Complaint filed herein say:

1. Defendants admit the jurisdiction of the court.
 2. Defendants admit the allegations of Par. 2 of the Amended Complaint.
 3. Defendants admit the allegations of Par. 3 of the Amended Complaint.
 4. Defendants admit the allegations of Par. 4 of the Amended Complaint.
 5. Defendants admit the allegations of Par. 5 of the Amended Complaint.
 6. Defendants admit the allegations of Par. 6 of the Amended Complaint.
 7. Defendants admit the allegations of Par. 7 of the Amended Complaint.
 8. Defendants admit that by letter dated May 29, 1944 plaintiff requested leave of absence from the public schools, as alleged in Par. 8 of the Amended Complaint, and respectfully refer the court to a copy of said letter, which is attached hereto, marked "Exhibit A", and made part hereof.
- 5 9. Defendants admit the plaintiff's request for leave of absence was duly approved, as alleged in Par. 9 of the Amended Complaint, and respectfully refer the court to a copy of the order granting leave of absence, which is attached hereto, marked "Exhibit B" and made part hereof.

10. Defendants admit that plaintiff resigned from his position as instructor of illiterate adults at Holabird Signal Depot effective October 19, 1944. Defendants admit that by letter dated October 20, 1944, plaintiff applied for reinstatement as a teacher in the public schools, and respectfully refer the court to a copy of said letter, which is attached hereto, marked "Exhibit C" and made part hereof.

11. Defendants admit the allegations of Par. 11 of the Amended Complaint.

12. Defendants admit that plaintiff has been denied an increase in salary of \$100.00, as of July 1, 1944, as alleged in Par. 12 of the Amended Complaint, but say that plaintiff did not receive and was not entitled to longevity increase as of July 1, 1944 for the reason that on said date he had not completed the school year 1943-44, and from June 4, 1944 to November 2, 1944 was not occupying the position of permanent teacher in the public schools of the District of Columbia, but was on leave of absence from such position, in a non-pay status and performing no service in the public schools, and had only the privilege of reinstatement to such position.

WHEREFORE, having fully answered, defendants pray that the Amended Complaint be dismissed.

RICHMOND B. KEECH,
Corporation Counsel, D. C.

VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.

JOHN NESBITT,
Assistant Corporation Counsel, D. C.,

Attorneys for Defendants,
District Building,
14th Street and Pennsylvania Avenue, N. W.,
Washington, D. C.

Copy of the foregoing Answer to Amended Complaint served by mailing same, postage prepaid, to Leonard S. Hayes, Esq., Attorney for Plaintiff, 613 F Street, N. W., Washington, D. C., this 11th day of October 1945.

/s/ JOHN NESBITT,
Assistant Corporation Counsel, D. C.

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"Exhibit A"

Copy

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA
 PHELPS VOCATIONAL SCHOOL
 Washington, D. C.

May 29, 1944

Dr. Garnet C. Wilkinson
 First Assistant Superintendent
 Franklin Administration Building
 Washington, D. C.

Dear Dr. Wilkinson:

Please consider this request for leave of absence from the Public Schools of the District of Columbia after June 4, 1944. I have an appointment to Camp Holabird, Maryland, as Instructor of Illiterate Soldiers, service described by the Personnel Officer as "urgently required in the war effort." Thank you.

Sincerely yours,

(signed) PAUL COOKE

O. W. McDONALD (signed)

G. C. W. (signed)

"Exhibit B"

Copy

June 3, 1944.

June 7, 1944

LEAVE OF ABSENCE

Grant leave of absence to the following-named person, as noted, effective from and after the date stated:

MR. PAUL P. COOKE (1203 Girard Street, N. W.)

Teacher, salary class 2C, \$2,000, English (Major) History (Minor), Phelps Vocational School, Divisions 10-13, (GSI), for the purpose of entering upon civilian work vital to National Defense and the War Effort as an Instructor of Illiterate adults in the Army Service Forces at Holabird Signal Depot, Baltimore, Maryland, not to extend beyond June 30, 1944. Such leave to carry with it the preferred right to return to original position. June 4, 1944.

Note: Mr. Cooke's position at the Phelps Vocational School will be filled temporarily by the appointment of a qualified teacher whose services in the aforesaid position will be terminated when Mr. Cooke returns to his position. Application for reinstatement must be made within forty days after the position which Mr. Cooke was granted leave to fill ceases to be an emergency position or within forty days after the ending of the present war, whichever occurs first.

.....,
Superintendent of Schools.

Submitted by:

.....
First Assistant Superintendent of Schools

"Exhibit C"

Copy

1203 Girard Street, N. W.
Washington 9, D. C.

20 October 1944

Dr. Garnet C. Wilkinson
First Assistant Superintendent
Franklin Administration Building

Dear Dr. Wilkinson:

Effective 19 October 1944, I resigned from the position of Instructor of Illiterate Adults, Holabird, Signal Depot, Baltimore, 19, Maryland.

I now apply for reinstatement as a teacher in the Public Schools of the District of Columbia, effective 6 November 1944. The several days until that date I should like to use to clear up a number of pressing business matters.

Thank you.

Sincerely yours,

(s) PAUL COOKE.

Motion for Summary Judgment

The plaintiff, Paul Cooke, moves the Court as follows:

1. To grant to the plaintiff a summary judgment in the above-captioned cause of action; and cites as reasons therefor the fact that from the complaint and answer filed, it appears that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law.

HAYES AND REEVES,

By LEONARD S. HAYES,
Attorneys for Plaintiff,
2002 Eleventh Street, N. W.,
Adams 3233.

10 **Points and Authorities in Support of Motion
for Summary Judgment**

Seagram-Distillers Corp. v. Manus, 25 F. Supp. 233.

Fink v. Northwestern Mutual Life Ins. Co., 29 F. Supp.
972.

James A. Pike, John W. Willis, 38 Columbia Law Review,
1436.

HAYES AND REEVES,

By /s/ LEONARD S. HAYES,
2002 Eleventh Street, N. W.,
Adams 3233,
Attorney for Plaintiff.

11 Motion for Summary Judgment

The defendants move the Court to grant them summary judgment in the above-captioned cause.

The ground for this motion is that the pleadings herein show on their face that plaintiff has not stated a claim against defendants upon which relief may be granted.

VERNON E. WEST,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Assistant Corporation Counsel, D. C.

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendants,
District Building.

Service of a copy of the foregoing Motion for Summary Judgment was made upon Leonard S. Hayes, Esq., attorney for plaintiff, by mailing a copy of same to him at his last known address, 2002 Eleventh Street, N. W., Washington, D. C., this 7th day of June, 1946.

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.

12 Points and Authorities in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment

The uncontradicted allegations of the pleadings herein established that the plaintiff, prior to June 4, 1944, was a teacher in the public school system of the District of Columbia having a permanent salary classification of 2C under Chapter 6 of Title 31 of the D. C. Code, 1940; that, pursuant to his request, on that date he was granted leave

of absence without pay from such employment to accept civilian employment as an instructor of illiterate soldiers at Camp Holabird, Maryland (Defendants' Exhibit B); that on and prior to said date he was receiving a salary of \$2,000 per annum for said employment; that he remained on leave of absence without pay until November 2, 1944; and that on this date he was reinstated to his original position at the aforesaid salary.

Section 626 of Title 31 of the D. C. Code provides:

"On the first day of each fiscal year, if his work is satisfactory, every permanent teacher, school officer, or other employee shall receive an annual increase in salary within his salary class or position as provided in section 31-621 without action of the Board of Education."

The purpose of this cause of action is to determine the question whether the plaintiff was entitled to the benefit of the automatic longevity salary increase provided for in this Code section while on the leave of absence set forth above.

It is the position of the defendants that the plaintiff cannot be a permanent employee within the purview of this section while on leave of absence without pay, and that in order to be entitled to the longevity increase his "satisfactory work" must have been performed during active service in the public school system of the District of Columbia.

Obviously it was not the intent of Congress to permit an individual to take up employment as a teacher in the local schools, then to enter private industry or employment after being granted leave of absence without pay, and then to seek reinstatement many years later, at the same time claiming the benefits of the Act extended for loyal and continued service and demonstrated experience in the

teaching field. The longevity increase is primarily intended to reward teachers for their active service in the public schools of the District of Columbia and consequently services otherwise performed are not intended to be given equivalent consideration.

The case of *Juddson v. Board of Education of City of New York*, 8 N. Y. S. (2d) 563, is authority for the proposition that a teacher on leave of absence without pay has left the employment, although perhaps only temporarily, and is not entitled to remuneration until resumption of actual and personal service.

The particular question raised here, however, has been squarely presented and disposed of, as far as can be determined, in only one reported opinion, a decision of the Comptroller General (B-41728) reported at Volume 23 Decisions of the Comptroller General of the United States 877.

Section 22 of Title 39, United States Code, provides as follows:

"Promotion regardless of increase of pay. All employees provided for in this chapter in automatic grade who have not reached the maximum grade to which they are entitled to progress automatically, shall be promoted at the beginning of the quarter following the completion of one year's satisfactory service since their last promotion, regardless of any increases in salaries granted them by the provisions of this chapter." (February 28, 1925, 43 Stat. 1065.)

14 This Act applies to employees of the United States Postal Service. On April 28, 1944, the Postmaster General wrote the Comptroller General requesting information respecting the rights of Postal Service employees who transferred to private industry engaged in the war effort and who subsequently were reemployed by the Post

Office Department within the purview of this statute, which is of course quite similar to the one presently under consideration. In his reply the Comptroller General stated:

“The ‘one year’s satisfactory service’ mentioned in the statute to entitle a postal employee to an automatic promotion manifestly means service in the Postal Service. There is no law, or regulation having the force and effect of law, which specifically authorizes the counting of service in private industry to which employees are assigned pursuant to War Manpower Directors and War Service Regulations of the Civil Service Commission issued thereunder for the purpose of *increasing* the compensation or the amount of leave to the credit of Federal employees upon restoration of their Federal positions. While this office has recognized that reemployment benefits are granted by War Manpower Directive No. X and the War Service Regulations issued thereunder, to employees entering private enterprise connected with the conduct of the war upon substantially the same basis as granted by law to civilian employees entering the active military or naval service, to the extent of restoring the *same benefits* held by the employees when they left their Federal positions to enter private industry (see decision of May 4, 1944, B-41511, 23 Comp. Gen. 841, question and answer 7), in the absence of a statute, or regulation having the force and effect of law, specifically so providing, it may not be concluded that service in private industry may be counted for *increasing* such benefits upon restoration of an employee to a Federal position. The counting of active military or naval service for automatic promotions is authorized by section 8 of the Selective Training and Service Act, approved September 16, 1940, 54 Stat. 890, Compare, 39 U. S. C. 818, applicable to postal employees during the

first World War. Also, compare section 5 of Executive Order No. 8882, dated September 3, 1941, authorizing credit of active military or naval service for automatic promotion of employees occupying permanent positions within the purview of the Classification Act, as amended. However, I know of no corresponding law or regulation applicable to service in private industry. See 22 Comp. Gen. 969, 974, (question and answer No. 4). Furthermore, no existing law or regulation

15 tion authorizes in counting of active military or naval service for *increasing* leave benefits upon restoration to civilian positions. Hence, it would not be 'consistent with law' (quoting from the War Service Regulations) to count service in private industry for automatic promotion purposes, or for the purpose of increasing leave credits of postal employees upon restoration to their Federal positions."

It is thus apparent that since the plaintiff herein did not occupy the position of a permanent employee on July 1, 1944, and since his work was not "satisfactory" in the sense that it was not performed in the public school system of the District of Columbia, he is not entitled to the longevity increase until July 1, 1945.

WHEREFORE, it is respectfully submitted that summary judgment for the defendants should be granted.

VERNON E. WEST,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Assistant Corporation Counsel, D. C.

EDWARD A. BEARD,
*Assistant Corporation Counsel, D. C.,
Attorneys for Defendants.*

**16 Points and Authorities in Opposition to Defendants'
Motion for Summary Judgment**

The case *Juddson v. Board of Education of City of New York*, 8 N. Y. S. (2d.) 563 is not in point and offers nothing to the solution of issue as joined in the above captioned cause. The plaintiff is not seeking remuneration from the Board of Education and admits that he is not entitled to salary while he was on leave of absence without pay. However, the issue in this cause of action is whether or not he is entitled to his longevity increase awarded by statute, a point not at issue in the quoted case.

The second quoted authority, merely states that there is no known law as far as the Comptroller General is concerned which states that an employee entering private enterprise connected with the conduct of the war is entitled to increased benefits upon restoration of that employee to a Federal position.

The plaintiff contends that this opinion in no way controverts the fact that he was a permanent teacher on July 1, 1944; that he had given satisfactory service for the school year 1943-44 within the meaning of Section 626, Title 31 of the District of Columbia, that therefore as a matter of law he is entitled to the longevity increase for the school year 1943-44.

WHEREFORE, it is respectfully submitted that the Defendant's motion for summary judgment be dismissed and that the plaintiff be granted summary judgment on his motion.

HAYES AND REEVES,
By /s/ LEONARD S. HAYES,
2002 Eleventh Street, N. W.,
Adams 3233,
Attorney for Plaintiff.

Copy of the foregoing Points and Authorities mailed, postage prepaid, this 28th day of June, 1946, to Corporation Counsel, District Building, Washington, D. C.

/s/ LEONARD S. HAYES.

Order

Upon consideration of motions for summary judgment filed respectively by the plaintiff and defendants herein, points and authorities in support thereof and in opposition thereto, and this cause coming on to be heard on the 25th day of June 1946, on said motions, respective counsel stating thereupon in argument pursuant thereto that no genuine material issue of fact exists herein, and the Court having concluded that defendants are entitled to judgment as a matter of law, it is by the Court this 2nd day of July, 1946,

ORDERED, ADJUDGED, AND DECREED, that Civil Action No. 30123 in the District Court of the United States for the District of Columbia be, and the same hereby is, dismissed on the merits, and defendants shall have and recover from plaintiff their costs in the action and shall have execution therefor.

JENNINGS BAILEY,
Justice.

Copy of the foregoing proposed Order mailed this 28th day of June to Leonard S. Hayes, Esq., 2002 Eleventh Street, N. W., Washington, D. C., attorney for plaintiff.

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.

20 **Motion to Make Exhibits Part of Record**

The plaintiff, Paul Cooke, by his attorney, Leonard S. Hayes, moves the Court to make certain exhibits which were shown to the Trial Justice at the time of oral arguments of Motions for Summary Judgment a part of the record of the above-entitled cause of action. The said exhibits are as follows:

- (a). Rating sheet for year 1943-44.
- (b). Statement of credit from Chief Examiner.
- (c). Letter from Comptroller General of the United States.
- (d). Letter from Board of Commissioners for the District of Columbia.

LEONARD S. HAYES,
Attorney for Plaintiff.

21 **Order**

Upon consideration of the Motion To Make Exhibits Part of Record filed by the plaintiff herein and the Court having concluded that the said exhibits should be made part of the record of the above-entitled cause of action, it is by the Court this 10th day of October, 1946,

ORDERED, ADJUDGED, AND DECREED, That exhibits (a) Rating sheet for year 1943-44, (b) Statement of credit from Chief Examiner, (c) Letter from Comptroller General of the United States, (d) Letter from Board of Commissioners for the District of Columbia, be, and hereby are, made a part of the record of the above-entitled cause of action.

/s/ JENNINGS BAILEY,
Justice.

Exhibit A

PUBLIC SCHOOLS OF THE DISTRICT OF
COLUMBIA

GRAPHIC RATING SHEET FOR TEACHERS

Date June 30 1944

Name Paul P. Cooke Grade or Subject.....
School or Department Phelps Vocational School

Division 10-13

Maximum
Quality
of Service
I II

I. TEACHING

The following elements are fundamentals
of teaching:

- | | |
|--|---|
| 1. Knowledge of Pupils | 1 |
| 2. Care of Health of Pupils..... | 1 |
| 3. Control and Influence over Pupils.... | 1 |
| 4. Planning and Preparation | 1 |
| 5. Skilful Use of Techniques..... | 1 |
| 6. Evaluation of Results by Teachers and
Pupils | 1 |
| 7. Sensitiveness to Teaching Environment | 1 |
| 8. Initiative and Resourcefulness..... | 1 |

II. RELATION TO SCHOOL AND COMMUNITY

The following characteristics are essentials
in the relation of teachers to school and com-
munity:

- | | |
|--|---|
| 1. Promptness and Accuracy in Records
and Reports | 1 |
| 2. Regularity at Post of Duty..... | 1 |
| 3. Knowledge of School Procedure..... | 1 |
| 4. Care of School Property..... | 1 |

5. Participation in Extra-curriculum Activities 1
6. Participation in Community Activities 1
7. Co-operativeness—Working with and for Others 1
8. Courtesy, Tact, Self-control and Poise 1

III. PROFESSIONAL GROWTH AND ATTAINMENT.... 1

The degree to which the teacher has profited from such activities as the following is determined both by the cumulative effect of former years and by participation during the current year: Cultural Interests, Organized Study, Service on Educational Committees, Service in Professional Organizations, Teacher Training Service, Travel, Writing (Creative or Educational).

IT IS UNDERSTOOD THAT EVERY TEACHER IS NOT EXPECTED TO QUALIFY IN ALL OF THESE ACTIVITIES.

Rated by (S)	Reviewed by Garnet C. Wilkinson
Position Principal	Position 1st Asst. Supt.
Date June 2 1944	Date June 30, 1944

24

Exhibit B

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA

Franklin Administration Building
Thirteenth and K Streets, N. W.
Washington, D. C.

July 14, 1945

TO WHOM IT MAY CONCERN:

This certifies that Mr. Paul P. Cooke was awarded credit for three months teaching experience as instructor of illit-

erate adults, CAF-5, at Holabird Signal Depot. The credit was awarded in the oral examination by the Board of Examiners, Divisions 10-13, Public Schools, D. C., in connection with Mr. Cooke's examination for instructor in English in the Miner Teachers College.

HOWARD H. LONG

Chief Examiner, Divisions 10-13

Squadron K

376 Army Air Force Base

Sheppard Field, Texas

J

25

Exhibit C

COMPTROLLER GENERAL OF THE UNITED STATES

Washington

P 49171

April 28, 1945.

Mr. Paul Cooke, Instructor,

Miner Teachers College,

Georgia Avenue between Euclid and Fairmont
Streets, N. W.

Washington 1, D. C.

Dear Mr. Cooke:

Reference is made to your letter of April 14, 1945, as follows:

"I wish to appeal a ruling of the Auditor, District of Columbia, reported to the Superintendent of Schools No-

vember 21, 1944, in regard to my salary as a teacher in the Public Schools of the District of Columbia.

“From June 4, 1944, through November 1, 1944, I was engaged in civilian work vital to the war effort, namely, Teacher of Illiterate Soldiers, Holabird Signal Depot, Baltimore, Maryland, while on a leave of absence granted by the Board of Education. The Auditor ruled, on my return, that the annual salary increment would not be granted until July 1, 1945, instead of July 1, 1944, the normal date. This means, in effect, that for support of the war effort I am being penalized—made to wait more than seventeen months for the annual salary increment and delayed a year should I desire to take examination for higher salary.

“On Tuesday, April 17, 1945, my induction into the armed services is scheduled and during that time, I understand, salary increments are continued. It appears that the government is discriminating against the very important civilian effort vital to prosecution of the war.

“I should appreciate your consideration of this appeal of the Auditor’s ruling denying me the salary increment on July 1, 1944.”

In decision of February 24, 1922, 1 Comp. Gen. 451, it was held that—

“The General Accounting Office has no jurisdiction to settle a claim against the District of Columbia which has been disallowed by the District officials.” (Quoting from syllabus.)

Accordingly, this office is without authority to enter-
 26 tain your appeal from the action of the auditor of
 the District of Columbia in refusing to give you
 credit for service from June 4 through November 1, 1944,
 toward an automatic promotion as a teacher in the schools

of the District of Columbia. It would appear that your appeal—if to be pursued further—properly would be for addressing to the President, Board of Commissioners of the District of Columbia.

Respectfully,

LINDSAY C. WARREN

Comptroller General of the United States.

27

Exhibit D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Offices
Washington 4, D. C.

May 25, 1945.

Private Paul Cooke, 33992349
3706 AAF BU
Sheppard Field, Texas

Dear Sir:

I have your letter of May 13, 1945, in which you appeal the action of the Auditor, D. C., in refusing to allow you credit for service from June 4, 1944 to November 1, 1944, inclusive, on an automatic promotion as a teacher in the public schools of the District of Columbia. During the above period you were engaged in civilian work at the Holabird Signal Depot, Baltimore, Maryland, while on leave granted by the Board of Education.

Title 31, Section 621 (q) of the 1940 D. C. Code provides in part:

“That in crediting experience in teaching to any person who has been absent from his duties as a teach-

er because of military service the said board is hereby authorized to include naval, military, or other service with the armed forces of the United States Government or its allies as the equivalent of teaching experience."

In the opinion of the Auditor the civilian service at the Holabird Signal Depot was of a civilian nature and as such may not be counted as equivalent to teaching experience.

Title 31, Section 626, further provides:

"On the first day of each fiscal year, if his work is satisfactory, every permanent teacher, school officer, or other employee shall receive an annual increase in salary within his salary class or position as provided in section 31-621 without action of the Board of Education."

The Auditor further holds that you were not in a permanent teaching position on the first day of the fiscal year 1944 and, consequently, may not be granted an automatic increase until the first day of the next fiscal year which will occur on July 1, 1945.

28 I am of the opinion that the Auditor, D. C., has held correctly and your appeal for inclusion of this service on an automatic increase as of July 1, 1944, must therefore be denied.

Very truly yours,

JOHN RUSSELL YOUNG,
President,
Board of Commissioners, D. C.

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 9402

October Term, 1946

*United States Court of Appeals
for the District of Columbia*

DEC 20 1946

PAUL COOKE, *Appellant*,

Frank J. Williams
CLERK

v.

BOARD OF EDUCATION, ET AL., *Appellees.*

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Appellees,
District Building.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 9402

October Term, 1946

PAUL COOKE, *Appellant*,

v.

BOARD OF EDUCATION, ET AL., *Appellees*.

BRIEF FOR APPELLEES

COUNTER STATEMENT OF THE CASE

Prior to June 4, 1944, the appellant was a regularly employed teacher at Phelps Vocational School in the public school system of the District of Columbia having a permanent salary classification of 2C pursuant to the Act of June 4, 1924 (§ 31-610, D. C. Code 1940), receiving a salary of \$2000 per year

(Appellant's App., page 2). On that date his request for leave of absence without pay from his duties in order that he might accept civil employment instructing illiterate soldiers at Holabird Signal Depot, Baltimore, Md., was granted by the Board of Education for the period June 4 to June 30, 1944, (Appellant's App. 2, 7.) Such leave was extended by the Board of Education until June 30, 1945. Thereafter appellant resigned from Holabird and on November 2, 1944, was reinstated in the position from which he had been granted leave at the same salary, \$2000 per annum. (Appellant's App. 3.) An automatic longevity increment pursuant to the Act of June 4, 1924 (§ 31-626, D. C. Code, 1940) of \$100 as of July 1, 1944, was denied him (Appellant's App. 3). Appellant thereupon filed this action to compel the Board of Education and the Auditor of the District of Columbia to authorize payment of this longevity increase to him for the year commencing July 1, 1944, and for succeeding years. The motion of defendants for summary judgment was granted below, whereupon this appeal followed.

STATUTES INVOLVED

Act of June 4, 1924, 43 Stat. 373, ch. 250, § 7, § 31-626, D. C. Code 1940, providing (as codified):

"On the first day of each fiscal year, if his work is satisfactory, every permanent teacher, school officer, or other employee shall receive an annual increase in salary within his salary class or position as provided in Section 31-621 without action of the Board of Education."

Act of July 1, 1936, 49 Stat. 1194, ch. 175, § 2, § 31-612, D. C. Code 1940, providing in part:

"* * * that on and after July 1, 1924, the salaries of teachers, school officers, and other employees of the

Board of Education of the District of Columbia shall be as follows: * * * Class 2 — TEACHERS IN JUNIOR HIGH SCHOOLS * * *. Group C—A basic salary of \$1800 per year, with an annual increase in salary of \$100 for ten years, or until a maximum salary of \$2800 per year is reached. * * *"

SUMMARY OF ARGUMENT

The phrase "if his work is satisfactory" used in § 31-626 of the D. C. Code 1940 for the purpose of determining whether a teacher is entitled to automatic longevity salary increase connotes active employment upon a pay status in the District of Columbia public school system on the date upon which the salary increase is to take effect. This connotation is established by the intent of Congress as determined by application of familiar rules of statutory construction, among them expressio unius est exclusio alterius with reference to the "sabbatical leave" act (Act of June 12, 1940, ch. 342, § 5, 54 Stat. 350), which expressly reserves such increment to teachers on sabbatical leave of absence, and by construction of this code section in conjunction with the Act of May 10, 1916, ch. 119, § 6, 39 Stat. 120, which prevents payment of moneys appropriated by Congress to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2000 per annum.

The purposes of the automatic salary increase enactment are obviously to encourage continuity of employment, to reward faithful service, and to recognize the value of experience in the teaching field. Thus no inequity prevails by reason of the denial of the benefit in the present case. The separation from active employment was voluntary and presumably to the appellant's advantage, the experience obtained by the appellant in the education of illiterate soldiers did not necessarily increase his capacity for instruction of pupils enrolled in a vocational school, and the Board of Education was put to some inconvenience in arranging for the temporary replacement of the appellant.

The rating sheet exhibited at page 18 of appellant's appendix and relied on by him did not establish the satisfactory character of his work within the purview of § 31-626 of the Code, but merely established his efficiency during the period of time he was actively engaged as an employee of the Board of Education. The rating sheet is dated June 2, 1944, and could not possibly give any indication as to the character of appellant's services subsequent to that date.

ARGUMENT

The position of the Board of Education in this case can be stated briefly. The motives of the appellant in voluntarily terminating his active pay status as an employee of the Board of Education are of no moment in the determination of this case. The ultimate facts are that he voluntarily requested leave of absence without pay from his employment with the Board of Education in order to accept employment of a similar nature with what might be considered to be a competitive entity, at the same time attempting to preserve all of the emoluments which he might have earned in his former capacity. The severance was of his own volition; and the granting of the leave requested, reserving to him all credits and rights of seniority earned up until that time, was an act of grace on the part of the Board of Education; for the Board could have required him to continue in active employment or to resign. The Board thereafter extended his leave of absence for an additional year and upon his return to active employment gave him credit on his experience record for three of the five months he was on inactive status. These also were acts of grace. It has been and is now the intent of the Board to extend to the appellant every consideration to which in law he may be entitled by reason of his civilian service in the war effort. But by retention of the appellant upon the roll of teachers in an inactive status in order that the *status quo* could be protected and in order that he might aid the war effort with as little personal sacrifice as possible, the Board

has not undertaken, and may not in law undertake, to place him in a status equivalent to those who have performed their daily teaching tasks in the public school system while he has been otherwise engaged in civilian teaching activity.

The conditions of employment of regularly employed teachers in the Washington public schools are not exactly analogous to those pertaining to other District and Federal employees. Regularly employed teachers are not entitled either to limited annual or sick leave of absence with full pay as a matter of right, as are the great majority of Federal and District employees annually retained, nor can such leave be given to regularly employed teachers by administrative action of the Board of Education. (Act of March 4, 1911, 36 Stat. 1395, § 31-607, D. C. Code 1940.)¹ Even when leave of absence is necessitated by personal illness, the permanent teacher must compensate a substitute from earnings during his absence. The pay status of regularly employed teachers is congruent with their active status." Thus appellant's contention that the construction of the Code section urged by the appellees would in effect prevent every teacher on leave of absence without pay for a period which included July 1 of any year from receiving the annual increment immediately loses effect as a rhetorical argument; for such is exactly the case. True, the Board has authority to grant leave of absence, as appellant urges, citing Sections 607 and 632 of Title 31 of the Code;

¹ "Leave of absence of any regularly employed teacher shall not exceed thirty calendar days in any one school year, and for this period such teacher who may be absent shall be paid, in case the absence is due to personal illness, death in family, or quarantine on account of contagious disease, the salary of the position, less the amount paid to the substitute teacher, and any absence in excess of said thirty days or absence for cause other than herein specified shall be without compensation: *Provided further*, That all other employees of the Board of Education may, in the discretion of said board, be granted not exceeding thirty days' leave of absence with pay in any one calendar year, and in the event of the absence of any janitor, assistant janitor, engineer, assistant engineer, or caretaker, at any time during school sessions the Board of Education is hereby authorized to appoint a substitute, who shall be paid the salary of the position in which employed, and the amount paid to such substitute shall be deducted from the salary of the absent employee. (Mar. 4, 1911, 36 Stat. 1935, ch. 285)."

² This would not be true of a regularly employed teacher on sabbatical leave with part pay.

but appellant fails to note that the former section does not vest authority in the Board to grant a leave of absence *while the teacher remains on an active or full pay status*, and the latter section relates only to leave during the sabbatical year, which is specifically excepted from the general law pertaining to teachers. The argument advanced by the appellant, that, while he is elsewhere employed and on leave of continuing duration in inactive status, a substitute or temporary teacher earns for him yearly increases in salary conditioned upon the "satisfactory work" of a "permanent" employee, defeats itself.

Judicial construction of the Code section under consideration, we feel, should also be influenced by the application of Section 6 of the Act of May 10, 1916, 39 Stat. 120, ch. 117, the "double employment" statute. The record does not state with exactitude the capacity of the employment of the appellant while on leave from his teaching duties. He was, however, employed in a CAF 5 Civil Service Classification in the Army Service Forces, and almost conclusively presumed to have been paid from money appropriated by Congress in an amount of \$2,000 per year or more.³ He now seeks an additional \$100 per year to which he can only be entitled by reason of services performed in the District public school system during that same time. While this amount would be paid to him at a time subsequent to his employment with the Army Service Forces, it nevertheless was, if earned at all, earned during that employment, and may not be paid to him without doing violence to the terms of that said act. (N. B. The Act of May 10, 1916, as set forth in Sec. 31-631, D. C. Code, 1940, exempts teachers in the public schools of the District of Columbia who are contemporaneously employed by any of the executive departments or independent establishments of the United States government from the effects of this Statute. A review of the original statutes cited by the compiler, however, reveals that the appellant could not have been exempted from the pro-

³ In June of 1943 the base CAF 5 pay rate was \$2,000, Act of May 28 1928 45 Stat. 776, ch. 814, § 1.

visions of this statute, as amended, for more than the two months of July and August, during which the public schools were in vacation, and during which he could have received no pay as a teacher under Sec. 31-630, D. C. Code, 1940, of the five that he was on leave of absence without pay.)

Only one opinion has been found which, in the judgment of appellees, establishes a precedent akin to that sought here, 23 Comp. Gen. 877, (B-41728), and that of course is of limited effect before this tribunal. It is believed that the logic of the opinion applies with great force in the present case, however.

The Comptroller General was questioned by the Postmaster General as to whether postal employees transferring temporarily to private industry engaged in the war effort were entitled to the benefits of the Act of February 28, 1925, ch. 368, § 11, 43 Stat. 1065, 39 U. S. C. § 122,⁴ a statute quite similar to the one now considered. In part, the Comptroller General replied:

"The 'one year's satisfactory service' mentioned in the statute to entitle a postal employee to an automatic promotion manifestly means service in the Postal Service. There is no law, or regulation having the force and effect of law, which specifically authorizes the counting of service in private industry to which employees are assigned pursuant to War Manpower Directives and War Service Regulations of the Civil Service Commission issued thereunder for the purpose of *increasing* the compensation or the amount of leave to the credit of Federal employees upon restoration to their Federal positions. While this office has recognized that reemployment benefits are granted by War Manpower Directive No. X and the War Service Regulations issued thereunder, to em-

⁴ "Promotion regardless of increase of pay. All employees provided for in this chapter in automatic grades who have not reached the maximum grades to which they are entitled to progress automatically, shall be promoted at the beginning of the quarter following the completion of one year's satisfactory service since their last promotion, regardless of any increases in salaries granted them by the provisions of this chapter."

employees entering private enterprise connected with the conduct of the war upon substantially the same basis as granted by law to civilian employees entering the active military or naval service, to the extent of restoring the *same benefits* held by the employees when they left their Federal positions to enter private industry (see decision of May 4, 1944, B-41511, 23 Comp. Gen. 841, question and answer 7), in the absence of a statute, or regulation having the force and effect of law, specifically so providing, it may not be concluded that service in private industry may be counted for *increasing* such benefits upon restoration of an employee to a Federal position. The counting of active military or naval service for automatic promotions is authorized by Section 8 of the Selective Training and Service Act, approved September 16, 1940, 54 Stat. 890. Compare 39 U. S. C. 818, applicable to postal employees during the first World War. Also, compare section 5 of Executive Order No. 8882, dated September 3, 1941, authorizing credit of active military or naval service for automatic promotion of employees occupying permanent positions within the purview of the Classification Act, as amended. However, I know of no corresponding law or regulation applicable to service in private industry. See 22 Comp. Gen. 969, 974, (question and answer No. 4). Furthermore, no existing law or regulation authorizes the counting of active military or naval service for *increasing* leave benefits upon restoration to civilian positions. Hence, it would not be 'consistent with law' (quoting from the War Service Regulations) to count service in private industry for automatic promotion purposes, or for the purpose of increasing leave credits of postal employees upon restoration to their Federal positions."

Appellant attempts to distinguish the above set of circumstances from those at bar for three reasons, first, that the Board had authority to and did grant leave without pay to the appellant, and second, that the Board had authority

to and did extend the leave period. There is no showing in the reported opinion that the Post Office Department did not have similar authority and there is no showing as to how the power to grant or extend leave includes within it the power to grant an increase in salary. If appellant is entitled to an increase, he is to receive it, according to the literal phrasing of the Act, "without action of the Board of Education." Thirdly, appellant argues, since the Board gave academic or experience credit for three of the five months he was absent, it therefore is obligated to grant the increase claimed. Appellant apparently loses sight of the fact that the only fiscal duty of the Board and its members is a ministerial one to certify the facts of his case to the Auditor. They by the terms of the statute are deprived of the exercise of discretion as to whether the increase sought should be paid and are powerless to control or influence the ultimate outcome of this cause. The exercise of an administrative function in giving part experience credit to the appellant for his efforts at Holabird cannot possibly arrogate the right to grant a salary increase in express contradiction of the terms of the Act under which the increase might be due.

It is urged by appellees that inclusion by Congress in the subsequently enacted "sabbatical leave" statute, *infra*, of an express provision saving to those teachers on sabbatical leave with part pay all rights to salary increment while on such leave clearly establishes the propriety of a holding to the effect that right to salary increment is not intended to be saved pursuant to § 31-626 to those on leave without pay.

The legislature is presumed to know the existing condition of the law of the time the statute is enacted. *In re McKensie*, 142 Fed. 383. Unless this provision be construed to give to teachers on sabbatical leave an increment to which in its absence they would not be entitled, the provision has no meaning or effect. It is not the policy of this Court to permit such a construction.

Fields v. U. S., 27 App. D. C. 433, cert. den. and error dismissed 205 U. S. 292, 27 S. Ct. 543, 51 L. ed. 807;
District of Columbia v. Gardiner, 39 App. D. C. 389;
London and Lancashire Indemnity Co. of America v. Smoot, 52 App. D. C. 378, 287 Fed. 952;
Mallory Coal Co. v. National Bituminous Coal Commission, 69 App. D. C. 166, 99 F. (2d) 399.

And it requires no argument to force the conclusion that if a teacher on sabbatical leave with part pay would not, except by express statutory provision, be entitled to salary increment, neither would a teacher on inactive leave without pay.

Any argument advanced that the section should be interpreted to encompass those on leave without pay as well as those on sabbatical leave is answered by the application of the maxim *expressio unius est exclusio alterius*.

U. S. v. Arredondo, 31 U. S. 691, 8 Pet. 691, 8 L. ed. 547;
Suydam v. Broadnax, 39 U. S. 67, 14 Pet. 67, 10 L. ed. 357.

This Court said in *Lukens Steel Co. v. Perkins*, 70 App. D. C. 354, 107 F. (2d) 627 (reversed on other grounds, *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. ed. 1108,) citing *Gegiow v. Uhl*, 239 U. S. 9, 36 Sup. Ct. 2, 60 L. ed. 114:

“A statute, by prescribing the conditions and limitations which properly may be imposed upon one who seeks to enjoy a right, prohibits the denial of the right upon other grounds.”

Conversely, a statute relaxing the limitations of a prior statute as to members of a class who seek to enjoy a certain right denies to members of other classes the right to participate in the relaxed limitations.

For all of the foregoing reasons, it is respectfully submitted that the judgment of the District Court of of the United States for the District of Columbia herein should be affirmed.

VERNON E. WEST,
Corporation Counsel, D. C.,
 CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
 EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Appellees,
 District Building.